Case No. 87-1376

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

Supreme Court, U.S.
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STATE OF OHIO, ex rel.
CITY OF EUCLID

Relator-Appellant

vs.

RICHARD SHANK, Director of the
Ohio Environmental Protection Agency

Respondent-Appellee

On Appeal from the Supreme
Court of Ohio

JURISDICTIONAL STATEMENT

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Dated: February 16, 1988

QUESTIONS PRESENTED

I. WHERE THE UNITED STATES CONGRESS, UNDER THE 1972 CLEAN WATER ACT ("ACT"), HAS DELEGATED AUTHORITY TO A DIRECTOR OF A STATE ENVIRONMENTAL PROTECTION AGENCY TO ISSUE NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM ("NPDES") PERMITS, DOES THE DIRECTOR, IN ISSUING SUCH PERMITS, HAVE A CLEAR LEGAL AND CONSTITUTIONAL DUTY TO COMPLY WITH THE MANDATES OF THE ACT, INCLUDING SECTIONS 301 AND 302, AND FEDERAL REGULATIONS PROMULGATED PURSUANT TO THE ACT?

II. WHERE THE UNITED STATES CONGRESS, UNDER THE ACT, HAS DELEGATED AUTHORITY TO A STATE DIRECTOR TO ISSUE NPDES PERMITS, DOES THE DIRECTOR, IN ISSUING SUCH PERMITS, HAVE A CLEAR LEGAL AND CONSTITUTIONAL DUTY TO COMPLY WITH THE STANDARDS AND PROCEDURES ESTABLISHED BY CONGRESS AND THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY ("USEPA") AT SECTION 302 AND OTHERWISE IN THE ACT, OR, INSTEAD, MAY THE DIRECTOR ISSUE A PERMIT WITH MORE STRINGENT STANDARDS THAN ESTABLISHED BY THE USEPA BASED SOLELY UPON THE DIRECTOR'S SUBJECTIVE BELIEF AS TO THE CAPABILITY OF A WASTE WATER TREATMENT PLANT AND WHOLLY WITHOUT COMPLYING WITH THE PRIOR DETERMINATION, NOTICE, AND HEARING REQUIREMENTS OF THE ACT?

III. WHERE A STATE DIRECTOR, UNDER AUTHORITY DELEGATED TO HIM BY THE UNITED STATES CONGRESS, HAS ISSUED AN NPDES PERMIT WITHOUT COMPLYING WITH SECTION 302 OF THE ACT, THEREBY VIOLATING THE ACT AND THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND THE PERMIT CONTAINS STANDARDS MORE STRINGENT THAN THE STANDARDS ESTABLISHED BY THE USEPA AND MORE STRINGENT THAN THE STANDARDS IMPOSED ON ANY OTHER SIMILARLY SITUATED PERMITTEE, DOES THE DIRECTOR HAVE A CLEAR LEGAL AND CONSTITUTIONAL DUTY TO MODIFY THE PERMIT'S STANDARDS, SO THAT THEY COMPLY WITH THE STANDARDS ESTABLISHED BY THE USEPA, UNTIL THE DIRECTOR HAS COMPLIED WITH SECTION 302 OF THE ACT?

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Protection Agency

Respondent-Appellee

On Appeal from the Supreme
Court of Ohio

JURISDICTIONAL STATEMENT

Appellant, the City of Euclid, Ohio, appeals from the final judgment of the Ohio Supreme Court, dated November 18, 1987, dismissing Appellant's Complaint in Mandamus and/or Prohibition.

OPINIONS BELOW

The Entry of the Ohio Supreme Court, which appears in the appendix hereto, at A-1, infra, is unreported.

JURISDICTION

The City of Euclid filed its Complaint for a Writ of Mandamus and/or Prohibition in an effort to compel Appellee, as Director of the Ohio Environmental Protection Agency, to perform his duties as enjoined by law, or, alternatively, to prohibit Appellee from exercising power beyond the limits conferred on him by law. Specifically, Euclid sought to compel Appellee to follow Federal law, as set forth in 33 U.S.C. §§1311 and 1312, and 40 C.F.R. §133.102, when issuing a National Pollutant Discharge Elimination System ("NPDES") permit. Euclid sought to compel Appellee to modify Euclid's permit so as to incorporate the standards established by the United States

Environmental Protection Agency. As alleged, the permit that Appellee granted Euclid (and refuses to modify) is in violation, both procedurally and substantively, of Federal law.

The Ohio Supreme Court dismissed Euclid's Complaint on November 18, 1987. A Notice of Appeal to this Court was timely filed in the Ohio Supreme Court on February 8, 1988.

This Appeal is being docketed in this Court within ninety (90) days from the dismissal of the action below. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(2) [See, Live Oak Water Users' Association v. Railroad Commission of California, 269 U.S. 354 (1926); Sultan Railway & Timber Co. v. Department of Labor and Industries of Washington, 277 U.S. 135 (1928); and, Atchison, Topeka & Santa Fe Railway Co. v. Public Utilities Commission of California, 346 U.S. 346 (1953)].

CONSTITUTIONAL PROVISIONS, FEDERAL STATUTES AND REGULATIONS, AND STATE OF OHIO ENVIRONMENTAL PROTECTION AGENCY ORDER

FIFTH AMENDMENT, UNITED STATES CONSTITUTION

No person shall * * * be deprived of life, liberty, or property, without due process of law; * * *

FOURTEEN AMENDMENT, UNITED STATES CONSTITUTION

Section 1. Citizens of the United States.

All persons born or naturalized in the United, States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

33 U.S.C. §1342(b)

33 U.S.C. §1342. National pollutant discharge elimination system.

* * *

(b) State permit programs. . . . State shall submit a

statement . . . that the laws of such State . . . provide adequate authority to carry out the described program . . . .

(1) To issue permits which--

(A) apply, and insure compliance with, any applicable requirements of sections 301, 302 . . .

(C) can be terminated or modified for cause . . .

33 U.S.C. §1311

33 U.S.C. §1311. Effluent limitations.

(a) Illegality of pollutant discharges except in compliance with law. Except as in compliance with this Section and Sections 302, 306, 307, 318, 402, and 404 of this Act [33 USCS §§1312, 1316, 1317, 1328, 1342, 1344], the discharge of any pollutant by any person shall be unlawful.

(b) Timetable for achievement of objectives. In order to carry out the objective of this Act there shall be achieved-

(1)(A) * * *

(B) for publicly owned treatment works in existence on July 1, 1977, or approved pursuant to Section 203 of this Act [33 USCS §1283] prior to June 30, 1974 (for which construction must be completed within four years of approval), effluent limitations based upon secondary treatment as defined

by the Administrator pursuant to Section 304(d)(1) of this Act [33 USCS §1314(d)(1)];

40 C.F.R. §133.102

§133.102. Secondary Treatment.

The following paragraphs describe the minimum level of effluent quality attainable by secondary treatment. . .

* * *

(a) BOD_5

(1) The 30 day average shall not exceed 30mg.

(2) The 7 day average shall not exceed 45mg.

* * *

(b) SS

(1) The 30 day average shall not exceed 30mg.

(2) The 7 day average shall not exceed 45mg.

33 U.S.C. §1312

33 U.S.C. §1312. Water quality related effluent limitations.

(a) Establishment. Whenever, in the judgment of the Administrator, discharges from a point source. . , with the application of effluent limitations required under Section

301(b)(2) of this Act[1/], would interfere with the attainment or maintenance of that water quality. . . effluent limitations. . . for such point source. . . shall be established. . .

(b) Notice; hearing; adjustment by Administrator. (1) Prior to establishment of any effluent limitation pursuant to subsection (a) of this section, the Administrator shall issue notice of intent to establish such limitation and within ninety days of such notice hold a public hearing. . .

OEPA Permit No. E 803 *BD

* * *

The City of Euclid

* * *

Effluent Characteristic	Discharge Limitations	
	30 day	7 day
* * *		
00530mg/1 Suspended Solids [SS]	12	18
00310mg/1 BOD_5	12	18
* * *		

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1. The relevant effluent limitations of §301(b)(2) of the Act are set forth in 40 C.F.R. §133.102, as noted above.

STATEMENT OF THE CASE

Effective September 8, 1977, the Director of the Ohio Environmental Protection Agency (hereinafter "OEPA") issued a National Pollutant Discharge Elimination System (hereinafter "NPDES") permit to the City of Euclid (hereinafter "Euclid" or "City") for its publicly owned waste water treatment plant (hereinafter "plant"). The permit included effluent limitations on treated water discharged into Lake Erie.

In 1977, Euclid's plant was under construction for installation of extensive improvements designed to meet secondary treatment and phosphorus removal standards. The Director issued the permit with effluent limitations ("12/12") projected upon his opinion of full plant capability after completion of the construction. Said effluent limitations were, and are, far more stringent than national secondary

treatment standards and effluent limitations ("30/30") established by the Administrator of the United States Environmental Protection Agency (hereinafter "USEPA") and mandated by Clean Water Act §301 (hereinafter "CWA §301"). No notice was given, as required by Clean Water Act §302 (hereinafter "CWA §302"), as to any proceedings concerning, or determinations of, local water quality reasons requiring such stringent limitations. No appeal was filed. Unknown to Euclid at this time, however, the Director of OEPA was then, and was thereafter, issuing NPDES permits to all other Ohio publicly owned waste water treatment plants discharging into Lake Erie with much less stringent effluent limitations ("20/20").2/

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2. 40 C.F.R. §133.102, the national secondary treatment standard, inter

(Footnote Continued)

After the plant construction was completed in August, 1980, Euclid became aware of the disparate treatment it had received and filed an application with the regional OEPA office to modify the "12/12" NPDES permit. Euclid sought to include the national secondary treatment standards, as mandated by CWA §301, in its permit. This application was updated, renewed and amended by documents filed with OEPA and its Director on February 18, 1986.

At all times, the Director of OEPA has refused to act on the application. He has claimed that the limits cannot be

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(Footnote Continued)
alia, sets the effluent limitations for suspended solids and biochemical oxygen demand ("BOD_5"), both not to exceed 30 milligrams per liter in 30 consecutive days or "30/30". In contrast the Euclid limitations, as set by OEPA, are not to exceed 12 milligrams per liter or "12/12". The Lake Erie standards for all other publicly owned waste water treatment plants have been set by OEPA at 20 milligrams per liter or "20/20".

established until after Euclid has completed additional extensive plant construction and he can determine full plant capability. The Director has claimed authority to then set the NPDES permit limitations as stringently as possible, based upon his opinion of the plant's full capability.

On April 21, 1987, the City filed an action for a Writ of Mandamus and/or Prohibition in the Supreme Court of Ohio (amended by filing First Amended Complaint on July 20, 1987), to compel the Director of the Ohio Environmental Protection Agency (hereinafter sometimes referred to as "Director"), inter alia, to modify Euclid's NPDES permit to include the secondary treatment effluent limitations set forth in Title 40, Code of Federal Regulations, §133.102.

On June 19, 1987 the Director filed a Motion to Dismiss the City's Complaint in Mandamus, supported by a

Brief and affidavits. This filing was in the nature of a Summary Judgment Motion.

On or about September 28, 1987, Euclid filed a Motion for Summary Judgment and/or Peremptory Writ of Mandamus and/or Prohibition, a Brief in Support, and a Brief in Opposition to the Director's Motion to Dismiss. On October 11, 1987 the Director filed a Motion to Dismiss the City's First Amended Complaint. On the same day, the City filed a Brief in Opposition to the Director's Motion to Dismiss the Complaint. Finally, on October 28, 1987 the Director filed a Brief in reply to Euclid's Motion for Summary Judgment and Euclid's Brief in Opposition to the Director's Motion to Dismiss the First Amended Complaint. All of Euclid's Motions and Briefs were supported by affidavits to establish the relevant facts hereinafter stated.

On November 18, 1987 the Ohio Supreme Court sustained the Director's Motion to Dismiss. No findings of fact or conclusions of law were made, nor did the Court render a written opinion.

In the meantime, enforcement proceedings are pending in the United States District Court for the Northern District of Ohio, Eastern Division, in Case No. C83-3855 (filed September 27, 1983). In that case, both the United States and the State of Ohio seek, inter alia, civil penalties of up to $10,000, per day, for each of Euclid's violations of the unlawful and unconstitutional "12/12" effluent limitations contained in Euclid's 1977 NPDES permit.

STATEMENT OF FACTS

The operation and physical facilities of Euclid's waste water treatment plant are financed strictly from users' fees [i.e., fees from citizens, through an enterprise account, not the general

funds of the City], as mandated by Ohio Law. The plant has served Euclid area residents for over half a century.

Euclid operates the plant as a "person" for purposes of the 1972 Clean Water Act. The discriminatory "12/12" 1977 NPDES permit was issued pursuant to the 1972 Clean Water Act. [See, 33 U.S.C. §1362(5)].

As stated above Euclid, is exposed to a $10,000 per day civil penalty in U.S. District Court Case No. C83-3855. The United States and the State of Ohio are also seeking injunctive relief that would require the City meet the "12/12" effluent limitations of the 1977 NPDES permit. They are seeking such relief even though they know that the national secondary treatment effluent limitations are "30/30" and that the standard set by the OEPA for all other Ohio plants discharging into Lake Erie is "20/20"

[See, fn. 1, supra for explanation of the effluent limitations terminology].

The permit issue is, and has been, clearly an overriding impediment to settling the U.S. District Court enforcement case, i.e., as a condition of settlement, Euclid is expected to agree to unknown effluent limitations yet to be set by OEPA. These unknown limitations are not subject to review by the U.S. District Court in Case No. C83-3855. "Permit determinations . . . shall not be subject to judicial review in any civil . . . proceedings for enforcement." [See, 33 U.S.C. §1369(b)(2)]. Thus, Euclid, faced with up to $10,000 per day in penalties, cannot challenge the illegal and unconstitutional basis underlying the civil penalties and injunctive relief sought by the OEPA.

Further, evidencing the arbitrary and capricious nature of OEPA's

determination to permit standards is the following colloquy between U.S. District Court Judge Alvin I. Krenzler and Assistant Ohio Attorney General, Terrence M. Fay, speaking on behalf of the OEPA Director. When asked by Judge Krenzler what the permit's limits would be and why OEPA had not acted thereon, Attorney Fay indicated that Euclid's permit could be more stringent than "12/12" in the future, and that "the engineers. . . want to see how the plant will behave in the four seasons. . . and then write a permit to reflect that." [Transcript: U.S. District Court Case No. C85-3855, December 17, 1986 appended to lower court brief].

Euclid is subject to civil penalties in such enforcement proceedings not only because of the foregoing, but also because of unanticipated equipment design deficiencies and breakdowns experienced during, and after,

completion of its initial construction project, in August, 1980, to meet the standards of the CWA. This project cost $20,000,000.00 (75% EPA Grant, 25% Euclid's share, borrowed and financed). Engineering studies, completed in 1982, after the above-mentioned construction demonstrated design and equipment deficiencies. Thereafter, a $9,000,000.00 construction project (100% paid by Euclid loan) was commenced in December, 1984. This project was substantially completed by late 1987, resulting in Euclid consistently meeting the "20/20" Lake Erie standard, but not the "12/12" standard, during 1987.

The second construction project could have commenced earlier, if not for opposition by the United States and the State of Ohio to an order in the District Court proceedings which was required by Euclid's lender as a condition precedent to financing the project.

At the same time these parties were opposing the required order, they were seeking injunctions mandating the project.

As reflected, the Director has maintained that he has the unbridled, unfettered discretion to subjectively set the limits as stringent as he pleases, based upon whatever he feels a plant should be able to accomplish, i.e. full plant capability. The Director further maintains by his actions that he has no obligation to set these limits in advance of the design of the plant.

The City has maintained that the Director must issue and modify permits based upon objective, rational, constitutional (ensuring equal protection and due process) and legal water quality

related reasons and standards.[3] The permit limitations must not be more stringent than water quality reasons require. Further, the effluent limits for all waste water treatment plants discharging into Lake Erie must be the same, unless it is demonstrated that a specific local water quality related reason requires a more stringent limit for a certain plant or plants in order to achieve or maintain a requisite local water quality standard.

Because the Director has placed more stringent limits upon the City than those required by the National Effluent Limitation Standards and more stringent than the limitations contained in the permits of every other Ohio municipal

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3. Citing, inter alia, CWA §§301 and 302, 40 C.F.R. §133.102, Ohio Revised Code §6111.03(J), and the Fifth and Fourteenth Amendments to the United States Constitution.

Waste Water Treatment Plant (hereinafter "WWTP") discharging into Lake Erie, Euclid and its WWTP users are subject to penalties for discharges from their plant under circumstances faced by no other similarly situated Ohio municipality and WWTP users.

As stated, Euclid has engaged in extensive construction for improvements to its WWTP facilities, costing approximately $29,000,000.00 to date. This construction was undertaken and completed only after review, approval, and issuance of permits by the OEPA, or with its knowledge. Other construction to rebuild microstrainer equipment is currently underway.

On June 1, 1977, without identifying any local water quality related reasons, the OEPA Director, or his predecessor in office, drafted and approved an NPDES permit for Euclid's

plant with the "12/12" effluent limitations.4/

The bizarre, unconstitutional and unjust results of this arbitrary and capricious policy [i.e., a permit system wherein permit limits are set without regard to water quality related reasons and without regard to equal protection and due process] is evident from the following from a comparison of Euclid's

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4. In setting these limits, the Director did not follow the laws and constitution which require that effluent limits be set for water quality related reasons and afford equal protection to all similarly situated permit holders. Instead, he arbitrarily and capriciously set effluent limits based upon his opinion of full plant capability even before the plant was fully operational. There are no water quality related reasons stated anywhere in the Ohio EPA records for setting effluent limits for WWTPs discharging into Lake Erie at a more stringent limit than the national "30/30" secondary standard. Furthermore, there are no local water quality related reasons for setting effluent limits for Euclid "12/12" more stringently than any other publicly owned WWTP discharging into Lake Erie.

plant limits with the similarly situated plants.

COMPARISON OF EXISTING NPDES PERMIT LIMITATIONS FOR ENTITIES DISCHARGING TO LAKE ERIE

ENTITY	BOD		SS.	
	30-day	7-day	30-day	7-day
Willoughby/ Eastlake	20	30	20	30
*Euclid	12	18	12	18
N.E. Regional 14021 Lake Shore	20	30	20	30
N.E. Regional 5800 Memorial Shoreway	20	30	20	30
Lakewood	20	30	20	30
Rocky River	20	30	20	30
Avon Lake	20	30	20	30
Lorain	20	30	20	30
Sandusky	18	24	20	30
Toledo	30	45	25	40

*Euclid users are subject to the "12/12" standard and exposed to 66.7% more violations than are users of other WWTPs subject to the "20/20" standard and also discharging into Lake Erie and 166% more violations than would apply if the mandatory "30/30" National Secondary Treatment Standard was applied.

Euclid's limitations are not only totally unrelated to any local water quality reason, but are in excess of what the City's facilities could be expected to satisfy. The unequal treatment of the City has resulted in discriminatory costs and penalty exposure to the City and the users of its plant.

In 1977, prior to issuing the Euclid permit, the Director, and his predecessors, did not conduct any substantial review or inspection of the Euclid's plant; make a water quality related determination; give notice of any study or intent to establish effluent limitations more stringent than those required by CWA §301 for local water quality reasons; hold a public hearing thereon; or, otherwise comply with any of the provisions mandated by

CWA §302 and Ohio Revised Code §6111.03(J).

Contrary to his mandatory legal duties, the Director, and his predecessors, have never stated, or even alleged, to the present date any local water quality related reason for requiring limitations greater than secondary treatment for the plants discharging into Lake Erie, or for requiring Euclid to meet more stringent limitations than those applied to all other similarly situated plants discharging into Lake Erie.

In October, 1982, officials of the State of Ohio and the USEPA acknowledged receipt of the City's applications for modification of the 1977 permit (April, 1982) and a new modified permit (May 24, 1982). They indicated that they would not act upon the City's applications until the newly-planned construction projects were completed. They further

stated that the limits would be based subjectively only on what they believed to be plant's full capability.

On February 18, 1986, when Euclid renewed and amended its 1982 applications for modification and for a new modified permit and otherwise submitted a present application for a new permit with modifications to the OEPA and USEPA, specific references to the USEPA regulations under which the permit should include less stringent limitations were included. The OEPA Director's permit modification authority for cause is expressly required by 33 U.S.C. §1342(6)(1)(C).

At and after the April, 1987 filing of Euclid's Complaint in the Ohio Supreme Court in this matter, the City received notices from the OEPA Director that its applications for a new permit and modifications, subject to adjudicatory hearing rights, would be denied.

This notice came not within 180 days of the filing of the application -- as required by Ohio Revised Code §6111.03(J) -- but 5 years after the original filings and over one year from the February 18, 1986 amendments. These matters remain pending due to Euclid's filing of timely notices and demands for adjudication hearings.

While recent statistics indicate that Lake Erie is cleaner than at any time in recent history, Euclid and its users are still placed in a position of designing improvements without knowing what its next permit will require, or how many more millions of dollars will have to be invested, to satisfy the arbitrary opinion of the Director as to plant capability with all equipment on line. Obviously, if the standard to be met is known in advance of construction, equipment design can include the capability to meet standards at all times,

including during equipment repairs and breakdowns. This would allow Euclid and its users to avoid exposure to exorbitant evidence penalties. This is not possible with full plant capability as the standard.

A prompt determination would establish Euclid's penalty exposure before the U.S. District Court and permit final disposition of such proceedings. In view of the past posture of the OEPA Director, no such determination will be forth coming in the absence of Court direction.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

This case presents important federal questions which are of great public interest. Such issues have national implications that transcend this particular case. We are dealing with a Congressional Act intended to produce clean water. It was not the intention of Congress to victimize or

inflict national or local uncertainty as to expensive planning on those to be regulated.

There are literally thousands of treatment plants, both privately and publicly owned, and millions of users paying for those plants' services across the country, who are affected. This case directly impacts nott only upon Euclid, but also upon the hundreds of thousands of users of Euclid's plant, as well as all of the other Ohio plants and users which may be subjected to the same sort of OEPA decisions. Furthermore, there should be uniform application and enforcement of the national Clean Water Act all across the nation, not one standard of enforcement in Ohio, another in New York, another in California, etc.

This Court should decide this case in order to provide a definitive statement that State EPA Directors are bound to comply with CWA §§301 and 302.

Moreover, this Court should make it clear that meeting the requirements of necessary water quality standards for water quality reasons is the basis for State Directors to set limitations more stringent than mandated by the USEPA. The standard for setting such limitations should not be the subjective opinion of a particular Director as to full plant capability of a particular plant. People have to make decisions about plant design which will cost billions of dollars. They should have advance notice as to what effluent limitations their plants will have to meet. If a planner knows what limitations he has to meet, contingency equipment can be included to accommodate breakdowns. Engineers can be hired and made accountable as to what they must design. With the present uncertainty, otherwise beneficial plans for plant construction are rendered inadequate

because they must include contingency plans to meet unknown limitations and include projections of unknowable future costs.

The practices complained of, when carried to their logical conclusion, could well price certain services out of the market and have a debilitating effect upon the economy. There is obviously a need for certainty in private and public decisions as to planning and designing expensive treatment plants. When the authority delegated to a Director of a state agency is being abused or used by the Director in an unlawful manner, it becomes an issue affecting all persons and citizens subject to the permits.

A definitive statement by this Court is also needed to insure consistency and fairness in all states administering the NPDES permit system and in enforcing the 1972 Clean Water Act.

Although the United States Environmental Protection Agency may delegate its authority to individual states [33 U.S.C. §1342(b)] to issue and modify NPDES permits to facilities in order to control and minimize water pollution, the State Directors, including the OEPA Director, are required to issue and modify permits within the guidelines and standards of the 1972 Clean Water Act.

The 1972 Clean Water Act requires that NPDES permits for publicly owned waste water treatment plants contain the standards of the secondary treatment regulations established by the Administrator of the USEPA based upon water quality reasons. More stringent limits may not be applied in any particular case except for specific local waters quality reasons, and only after notice and a public hearing on the merits of the more stringent limits.

The CWA §301(b)(1)(B) requires the Director to issue permits for publicly owned waste water treatment plants with effluent limitations for secondary treatment as defined by 40 C.F.R. §133.102 ("30/30"). As illustrated above, the Director, as permitted by CWA §302, may issue permits with effluent limitations more stringent than the USEPA established secondary standards ("30/30"), only if there are local water quality reasons and only after notice of a determination of such reasons and only after a hearing for presenting evidence of the local reasons for, and effluent limitations needed to achieve and maintain, the required local water quality conditions.

The Director's actions in issuing Euclid's "12/12" permit in violation of CWA §§301 and 302 and his refusals to take corrective action are not only illegal, but are unconstitutional as

well. Clearly, his actions violate the Fifth and Fourteenth Amendment to the United States Constitution. The Director insists that he can issue an NPDES permit based solely upon his belief of plant capability. By the Director's actions and refusals to act, Euclid users are subject to penalties for discharges from their plant -- financed by their payment of fees through an enterprise accounting fund -- under circumstances where no other similarly situated Ohio user would be subject to such penalties. It is equally unjust for the Director to continually subject Euclid users to such penalties when absolutely no water quality related reasons have been stated, or exist, to justify deviation from the national ("30/30") or Lake Erie ("20/20") standard.

Application of the Equal Protection clause of the United States

Constitution to the Director's actions and refusals to act demonstrates their illegality. Table I, page 22, demonstrates that all other Ohio plants discharging into the same lake as Euclid (Lake Erie) have been issued NPDES permits by the Director with less stringent effluent limitations. Such plants are listed from east to west and therefore the flow of the water and plant location has no apparent impact upon the limitations imposed.

Euclid filed an affidavit in the Ohio Supreme Court establishing that under the present "12/12 Euclid only" standard, the City is exposed to 66.7% more violations than would apply if the "20/20 Lake Erie equal protection" standard was used and 166% more violations than would apply if the mandatory "30/30 national secondary treatment standard" was used, as mandated by CWA §301.

Not only is the Euclid's permit unconstitutional for want of equal protection, but it is also inconsistent with the Due Process clauses contained in the Fifth and Fourteenth Amendments to the United States Constitution.

It is undisputed that the Director issued, and has refused to modify, Euclid's NPDES permit based upon his opinion of plant capability with all equipment on line. The permit's limitations are not based on water quality related reasons and hearings after notice of a local water quality determination. The Director could not possibly have given notice of a determination of his reason, since there was, and is, none. Moreover, he could not possibly have presented evidence concerning his determination for the same reasons. Euclid, under the circumstances of this case, is being subjected to penalties, without recourse, for alleged violations

of a permit which was issued without the Due Process of law guaranteed to Euclid as a person and its citizen users by the United States Constitution.

Euclid is entitled to the protections of the Fourteenth Amendment against the State because, the operation of a sewer plant by a municipality has been legally treated as a proprietary function [See, Haverlack v. Portage Homes, Inc., 2 Ohio St.3d 26 (1982); and, Ohio Revised Code §2744.01(G)]. Additionally, Euclid is defined and treated as a "person" under the Federal and State Clean Water Acts [See, 33 U.S.C. §1362(5); and, Ohio Revised Code §6111.01(i)], entitled to the same protection applicable to all others so defined.

Where, as in the case sub judice, a public officer is under clear legal duty to act in a specified manner, mandamus is an especially appropriate

remedy. The purpose of the writ of mandamus is to compel a public officer to perform the duties imposed on him by law. State, ex rel. Scott v. Masterson, 173 Ohio St. 402 (1962).

Mandamus lies to enforce the performance of a ministerial act or duty. Such an act or duty has been defined as one which a person performs in a given situation, in a prescribed manner, in conformance with a mandate of legal authority and without regard to, or the exercise of, his own judgment upon the propriety of the act being done. State, ex rel. Watkins v. Donahey, 110 Ohio St. 494 (1924). For example, a public duty, plain, specific and positively required by law, is ministerial in nature and, if not calling for the use of discretion, is enforceable by mandamus in the absence of other means of relief. State, ex

rel. Lancaster v. Bowers, 26 OCC 326 aff'd. 70 Ohio St. 423 (1904).

While the duty to be enforced by mandamus must be clear, specific and not discretionary, it does not follow that the public officer may not exercise judgment and intelligence as to how it is to be performed. State, ex rel. Drucker v. Reichtle, 52 Ohio L. Abs. 94 (Cuy. Cty. Court of Appeals, 1948). And, it is well settled that a writ of mandamus may issue to correct an abuse of discretion or an act which is arbitrary, tyrannical or unreasonable. State, ex rel. Democratic Executive Committee v. Brown, 39 Ohio St.2d 157 (1974); Bar Realty Corp. v. Locher, 30 Ohio St.2d 190 (1972); State, ex rel. Mansour v. Industrial Commission of Ohio, 19 Ohio St.2d 94 (1969); State, ex rel. Sheppard v. Koblentz, 174 Ohio St. 120 (1962) cert. denied 373 U.S. 911; and, Brunson v. Bedner, 28 Ohio App.2d

63 (Franklin Cty., 1971). Clearly, the Appellee in this case is under a clear legal and constitutional duty to follow Federal law when issuing a NPDES permit, and it was an abuse of discretion by the Ohio Supreme Court to refuse to order Appellee to act in conformance with Federal law.

The Court should hear this case and render a definitive decision because, the practice of OEPA and its Director in issuing and/or modifying NPDES permits' effluent limitations based on a particular waste water treatment plant's capability is clearly in violation of the Constitution and Statutes of the United States.

Euclid is clearly the victim of fundamental unfairness and is without any other effective redress. In assessing civil penalties and other relief to enforce Euclid's NPDES permit, the U.S. District Court is required to disregard

the illegality and unconsitutionality of the permit and the OEPA Director's refusal to modify it. Clearly, the OEPA Director has demonstrated that he will not resolve this issue by following the law, unless so ordered by this Court.

Although presented with the same questions hereinabove presented, and presented with a request that the OEPA Director be compelled to follow the law, the Ohio Supreme Court has clearly declined to enforce CWA §§ 301 and 302 without any explanation and without dealing with the federal issues raised. Unless the error of the Ohio Supreme Court is immediately corrected, Euclid and its users will face the serious consequences of this injustice.

The holding of the Ohio Supreme Court, while aware of the underlying facts, including Euclid's penalty exposure in the U.S. District Court, without a hearing or even citing its

reasons, is clearly unjust and unfair to Euclid and the citizens who use Euclid's service.

CONCLUSION

For these reasons, this Court should give plenary consideration to this appeal.

Respectfully submitted,

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City of Euclid

Dated: February 16, 1988

STATEMENT AND CERTIFICATE OF SERVICE

All parties to this appeal and required to be served [Richard Shank, as Director of the Ohio Environmental Protection Agency, being the only other party] have been served. His name and address is:

Richard Shank, Director
Ohio Environmental Protection Agency
361 East Broad Street
Columbus, Ohio 43266-0558

Three copies of the foregoing JURISDICTIONAL STATEMENT were forwarded by regular U.S. Mail, postage prepaid, to Anthony J. Celebrezze, Jr., Attorney General of Ohio and to Margaret A. Malone and Terrence M. Fay, Assistant Attorney General, Environmental Enforcement Section, 30 East Broad Street, 17th Floor, Columbus, Ohio 43266-0410, Attorneys for Respondent-Appellee, Richard Shank, on this 15th day of February, 1988.

Henry B. Fischer

Henry B. Fischer

A P P E N D I X

s55ac:ljd:3

A-1

IN THE SUPREME COURT OF OHIO
COLUMBUS

State of Ohio, ex rel. City of Euclid	)	1987 TERM
	)	To wit:
	)	November 18, 1987
Relator	)	
vs.	)	
	)	Case No. 87-685
Warren Tyler, Director, Ohio Environmental Protection Agency	)	
Respondent	)	

IN MANDAMUS ENTRY

This cause originated in this Court on the filing of a complaint for a writ of mandamus and was considered in a manner prescribed by law. Upon consideration of respondent's motion to dismiss,

IT IS ORDERED by the Court that said motion be, and the same is hereby, sustained.

IT IS FURTHER ORDERED by the Court that this cause be, and the same is hereby, dismissed.

/s/_____
THOMAS J. MOYER
Chief Justice

Clean Water Act
Sections 301(a) and (b)(1)(B) and 302
(P.L. 92-500, 86 Stat 846 effective
October 8, 1972)

33 U.S.C. §1311. Effluent limitations

(a) Illegality of pollutant discharges except in compliance with law. Except as in compliance with this Section and Sections 302, 306, 307, 318, 402, and 404 of this Act [33 USCS §§1312, 1316, 1317, 1328, 1342, 1344], the discharge of any pollutant by any person shall be unlawful.

(b) Timetable for achievement of objectives. In order to carry out the objective of this Act there shall be achieved-

(1)(B) for publicly owned treatment works in existence on July 1, 1977, or approved pursuant to Section 203 of this Act [33 USCS §1283] prior to June 30, 1974 (for which construction must be completed within four years of approval), effluent limitations based upon secondary treatment as defined by the Administrator pursuant to Section 304(d)(1) of this Act [33 USCS §1314(d)(1)];

33 U.S.C. §1312. Water quality related effluent limitations

(a) Establishment. Whenever, in the judgment of the Administrator, discharges of pollutants from a point source or group of point

sources, with the application of effluent limitations required under Section 301(b)(2) of this Act [33 USCS §1311(b)(2)], would interfere with the attainment or maintenance of that water quality in a specific portion of the navigable waters which shall assure protection of public water supplies, agricultural and industrial uses, and the protection and propagation of a balanced population of shellfish, fish and wildlife, and allow recreational activities in and on the water, effluent limitations (including alternative effluent control strategies) for such point source or sources shall be established which can reasonably be expected to contribute to the attainment or maintenance of such water quality.

(b) Notice; hearing; adjustment of limitation by Administrator.

(1) Prior to establishment of any effluent limitation pursuant to subsection (a) of this section, the Administrator shall issue notice of intent to establish such limitation and within ninety days of such notice hold a public hearing to determine the relationship of the economic and social costs of achieving any such limitation or limitations, including any economic or social dislocation in the affected community or communities, to the social and economic benefits to be obtained (including the attainment of the objective of this Act) and to determine whether

or not such effluent limitations can be implemented with available technology or other alternative control strategies.

(2) If a person affected by such limitation demonstrates at such hearing that (whether or not such technology or other alternative control strategies are available) there is no reasonable relationship between the economic and social costs and the benefits to be obtained (including attainment of the objective of this Act), such limitation shall not become effective and the Administrator shall adjust such limitation as it applies to such person.

(c) Delay in application of other limitations. The establishment of effluent limitations under this section shall not operate to delay the application of any effluent limitation established under section 301 of this Act [33 USCS §1311].

(§§301 and 302, as added Oct. 18, 1972, P.L. 92-500, §2, 86 Stat. 846.)

33 U.S.C. §§1342. National pollutant discharge elimination system

* * *

(b) State permit programs. * * * Administrator shall approve each such submitted program unless he determines that adequate authority does not exist:

(1) To issue permits which--

(A) apply, and insure compliance with, any applicable requirements of sections 301, 302, 306, 307, and 403 . . .;

(B) are for fixed terms not exceeding five years; and

(C) can be terminated or modified for cause * * *.

CODE OF FEDERAL REGULATIONS

Title 40 - Protection of Environment
CHAPTER 1
Subchapter D - Water Programs
PART 133 - SECONDARY TREATMENT INFORMATION §133.102 Secondary treatment

The following paragraphs describe the minimum level of effluent quality attainable by secondary treatment in terms of the parameters biochemical oxygen demand, suspended solids, fecal coliform bacteria and pH. All requirements for each parameter shall be achieved except as provided for in §133.103.

(a) Biochemical oxygen demand (five-day). (1) The arithmetic mean of the values for effluent samples collected in a period of 30 consecutive days shall not exceed 30 milligrams per liter.

(2) The arithmetic mean of the values for effluent samples collected in a period of seven consecutive days shall not exceed 45 milligrams per liter.

* * *

(b) Suspended solids. (1) The arithmetic mean of 30 consecutive days shall not exceed 30 milligrams per liter.

(2) The arithmetic mean of the values for effluent samples collected in a period of seven consecutive days shall not exceed 45 milligrams per liter.

* * *

Federal Register, Vol. 38, No. 159 - Friday, August 17, 1973

PART 133 - SECONDARY TREATMENT REGULATION

(September 20, 1984)

§133.102 Secondary treatment

The following paragraphs describe the minimum level of effluent quality attainable by secondary treatment in terms of the parameters - BOD_5, SS and pH. All requirements for each parameter shall be achieved except as provided for in §§133.103 and 133.105.

(a) BOD_5

(1) The 30-day average shall not exceed 30 mg/1.

(2) The 7-day average shall not exceed 45 mg/1.

* * *

(b) SS. (1) The 30-day average shall not exceed 30 mg/1.

(2) The 7-day average shall not exceed 45 mg/1.

* * *

* * *

OEPA Permit No. E 803 *BD

* * *

Effective Date: September 8, 1977

* * *

OHIO ENVIRONMENTAL PROTECTION

AGENCY AUTHORIZATION TO DISCHARGE

UNDER THE NATIONAL POLLUTANT

DISCHARGE ELIMINATION SYSTEM

In compliance with the provisions of the Federal Pollution Control Act, as amended (33 U.S.C. 1251 et. seq hereinafter referred to as "the Act"),

* * *

The City of Euclid

* * *

is authorized by the Ohio Environmental Protection Agency, hereafter referred to as "Ohio EPA", to discharge

* * *

to Lake Erie

* * *

in accordance with the conditions

* * *

of this permit.

* * *

PART I, A - FINAL EFFLUENT LIMITATIONS AND MONITORING REQUIREMENTS

1. During the period beginning on the effective date of this permit and lasting until the expiration date, the permittee is authorized to discharge in accordance with the following limitations and monitoring requirements from the following outfalls: E803001

EFFLUENT CHARACTERISTIC			DISCHARGE LIMITATIONS	
REPORTING CODE	UNITS	PARAMETER	Concentration Other Units (Specify) 30 day	7 day
		* * *		
00530	mg/1	Suspended Solids	12	18
00310	mg/1	BOD_5	12	18
		* * *		

UNITED STATES CONSTITUTION

AMENDMENT 5

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment 14

Section 1. Citizens of the United States.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Ohio Revised Code Section 6111.03. Powers of director of environmental protection.

The director of environmental protection may:

* * *

(H) Issue, modify, or revoke orders to prevent, control, or abate water pollution:

* * *

In the making of such orders. . . the director shall give consideration to, and base his determination on, evidence relating to the technical feasibility and economic reasonableness of complying with such orders and to evidence relating to conditions calculated to result from compliance with such orders, and their relation to benefits to the people of the state to be derived from such compliance in accomplishing the purposes of Chapter 6111. of the Revised Code.

* * *

(J) Issue, revoke, modify, or deny permits for the discharge of sewage, industrial waste, or other wastes into the waters of the state, and for the installation or modification of disposal systems or any parts thereof in compliance with all requirements of the "Federal Water Pollution Control Act" and mandatory regulations adopted thereunder, and set terms and conditions of permits, including schedules of compliance, where necessary. The terms and conditions shall be designed to achieve and maintain full compliance

with the national effluent limitations, national standards of performance for new sources, and national toxic and pretreatment effluent standards set under such act, and any other mandatory requirements of such act that are imposed by regulation of the administrator of the United States environmental protection agency. An application for a permit or renewal thereof shall be denied if:

(1) The secretary of the army determines in writing that anchorage or navigation would be substantially impaired thereby;

(2) The director determines that the proposed discharge or source would conflict with an area wide waste treatment management plan adopted in accordance with section 208 of the "Federal Water Pollution Control Act";

(3) The administrator of the United States environmental protection agency objects in writing to the issuance or renewal of the permit in accordance with section 402(d) of the "Federal Water Pollution Control Act"; or

(4) The application is for the discharge of any radiological, chemical, or biological warfare agent, or high-level radioactive waste into the waters of the United States.

To achieve and maintain applicable standards of quality for the waters of the state adopted pursuant to section 6111.041 [6111.04.1] of the Revised Code, the director shall impose, where necessary and appropriate, as conditions of each permit, water quality related effluent limitations in accordance with

sections 301, 302, 306, and 307 of the "Federal Water Pollution Control Act" and, to the extent consistent with such act, shall give consideration to, and base his determination on, evidence relating to the technical feasibility and economic reasonableness of removing the polluting properties from such wastes and to evidence relating to conditions calculated to result from such action, and their relation to benefits to the people of the state and to accomplishment of the purposes of Chapter 6111. of the Revised Code.

* * *

The director shall issue or deny an application for a permit for a new discharge, for the installation or modification of a disposal system, or for renewal of a permit, within one hundred eighty days of the date on which he receives a complete application with all plans, specifications, construction schedules, and other pertinent information required by the director.

* * *

A permit may be modified, suspended or revoked for cause. . .

* * *

Chapter 6111 of the Revised Code authorizes the state to participate in the national pollutant discharge elimination system, to administer and enforce the publicly owned treatment works pretreatment program, and to issue permits for the discharge of dredged or fill materials, in accordance with the "Federal Water Pollution Control Act." Chapter 6111. of the Revised Code shall

be administered, consistent with the laws of this state and federal law, in the same manner that the "Federal Water Pollution Control Act" is required to be administered. (emphasis added)

* * *

Ohio Revised Code Title 27 Courts - General Provision Special Remedies §2744.01 Definitions. As used in this chapter:
(G)(1) "Proprietary function" means a function of a political subdivision that is specified in division (G) (2) of this section or that satisfies all of the following:

* * *

(2) A "proprietary function" includes, but is not limited to, the following:

* * *

(c) The establishment, maintenance, and operation of a utility, including, but not limited to a light, gas, power, or heat plant, a railroad, a busline or other transit company, an airport, and a municipal corporation water supply system;
(d) The maintenance, destruction, operation and upkeep of a sewer system;

Ohio Revised Code Title 61: Water Supply-Sanitation-Distches §6111.01 Definitions.
As used in Chapter 6111. of the Revised Code
(1) "Person" means the state, any municipal corporation, political subdivision of the state, person as defined in section 1.59 of the Revised Code, interstate body created by compact, or

the federal government or any department, agency, or instrumentality thereof.

United States Code
Title 33: Navigation and Navigable Waters
§1362. Definitions
Except as otherwise specifically provided, when used in this Act:

* * *

(5) The term "person" means an individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a state, or any interstate body.

COMPARISON OF EXISTING NPDES PERMIT LIMITATIONS FOR ENTITIES DISCHARGING TO LAKE ERIE

ENTITY	BOD		SS.	
	30-day	7-day	30-day	7-day
Willoughby/ Eastlake	20	30	20	30
*Euclid	12	18	12	18
N.E. Regional 14021 Lake Shore	20	30	20	30
N.E. Regional 5800 Memorial Shoreway	20	30	20	30
Lakewood	20	30	20	30
Rocky River	20	30	20	30
Avon Lake	20	30	20	30
Lorain	20	30	20	30
Sandusky	18	24	20	30
Toledo	30	45	25	40

*Euclid users are subject to the "12/12" standard and exposed to 66.7% more violations than are users of other WWTPs subject to the "20/20" standard and also discharging into Lake Erie and 166% more violations than would apply if the mandatory "30/30" National Secondary Treatment Standard was applied.

[Filed In The Ohio Supreme Court
On February 8, 1988]

Case No. 87-685

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, ex rel.,
CITY OF EUCLID,

Relator,

VS.

WARREN TYLER, DIRECTOR OHIO
ENVIRONMENTAL PROTECTION AGENCY,

Respondent

NOTICE OF APPEAL
TO THE SUPREME COURT OF
THE UNITED STATES

Notice is hereby given that the above-named Relator, the City of Euclid, Ohio, hereby appeals to the Supreme Court of the United States from the final judgment of this Court dismissing Relator's Complaint in Mandamus, entered in this action on November 18, 1987.

This Appeal is taken pursuant to 28 U.S.C. §1257(2)

/s/_____
HENRY B. FISCHER
FREDERICK W. WHATLEY
PATRICIA F. WEISBERG

WALTER, HAVERFIELD
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Attorneys for Relator

CERTIFICATE OF SERVICE

A copy of the foregoing NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES was forwarded by regular U.S. Mail, postage prepaid, to Anthony J. Celebrezze, Jr., Attorney General of Ohio and to Margaret A. Malone and Terrence M. Fay, Assistant Attorney General, Environmental Enforcement Section, 30 East Broad Street, 17th Floor, Columbus, Ohio 43266-0410, on this ___ day of February, 1988.

/s/ _____
HENRY B. FISCHER